Supreme Court, U.S.
FILED

(1)

96 707 AUG 29 1996.

OFFICE OF THE CLERK

DOCKET NUMBER _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1995

JERRY BOYETT, A MINOR CHILD,
SUING BY HIS FATHER AND NEXT
FRIEND, WAYNE BOYETT,

Petitioner,

v.

LALAR TOMBERLIN, JIM HEAD,
SAMMY CARR, and CRENSHAW COUNTY
BOARD OF EDUCATION,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of the State of Alabama

# PETITION FOR WRIT OF CERTIORARI

CHARLES J. KETTLER, JR.
Counsel of Record for Petitioner
P.O. Box 47
Luverne, Alabama 36049
(334) 335-3262

21 pp

## QUESTION PRESENTED

Whether 42 U.S.C.A. § 1983 and the Due Process Clause of the Fourteenth Amendment guarantee a public school student the right to be excused from a classroom upon request when there is a bona fide and urgent need for him to use the toilet and such asserted reason is made known to the teacher and school authorities who have no specific and articulable reason to deny the request.

## PARTIES

The caption of the case contains the names of all the parties to this proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

Petition For A Writ of Certiorari ..... 1
Opinions Below ..... 2
Jurisdiction ..... 2
Constitutional and Statutory Provisions Involved ..... 3
Statement of the Case ..... 4
Argument ..... 11

TABLE OF CITED AUTHORITIES

Cases

Arnold v. Board of Education of Escambia County, 880 F. 2d 305 (11th Cir. 1989) ..... 12
Courtney Bonwell, et al. v. Thomas Bobo, et al., 659 So. 2d 98 (AL Supreme Court, 1995) ..... 12
Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed. 2d 231 (1960) ..... 15
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed 2d 731 (1969) ..... 15

Statutes

28 U.S.C.A. Section 1257 ..... 2

42 U.S.C.A. Section 1983 ..... 3

**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1995**

**Jerry Boyett, a minor child, suing by his father and next friend, Wayne Boyett,**

**Petitioner,**

**vs.**

**Lalar Tomerlin, Jim Head, Sammy Carr, and Crenshaw County Board of Education,**

**Respondents.**

**PETITION FOR A WRIT OF CERTIORARI**

**To the Supreme Court of the State of Alabama**

Petitioner, Jerry Boyett, prays that a writ of certiorari issue to review the judgment of the Alabama Court of Civil Appeals and Writ of Certiorari denied by the Alabama Supreme Court, and that on hearing the judgment be reversed.

## OPINIONS BELOW

The opinions of the Alabama Court of Civil Appeals and the Alabama Supreme Court are not yet reported.

## JURISDICTION

The original trial court, the Circuit Court of Crenshaw County, Alabama, entered its order granting summary judgment in favor of the defendants on April 17, 1995. The Alabama Court of Civil Appeals rendered its opinion affirming the judgment of the trial court on December 12, 1996. The Alabama Supreme Court entered its judgment denying certiorari without written opinion on May 31, 1996. This Court has jurisdiction under 28 U.S.C.A § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## STATEMENT OF THE CASE

Plaintiff Jerry Boyett, a minor child suing by his father and next friend, Wayne Boyett, filed a complaint in the Circuit Court for Crenshaw County, Alabama, on November 16, 1993, stating his causes in five counts. (CR 3-8) Count five alleged the following:

> 1. On or about the 13th day of September, 1993, the Plaintiff was attending school at Luverne High School and during school hours on school premises he suffered an immediate need to allow normal bowel and urinary functions due to diarrhea and so promptly sought permission from his classroom teacher, Defendant Lalar Tomberlin, to use the restroom.

2. The Plaintiff had a legal right to use the restroom on said occasion.

3. Defendant Lalar Tomberlin without just cause refused to give the Plaintiff permission to use the restroom, and a few minutes later Plaintiff renewed his request to use the restroom, and said Defendant again refused permission.

4. Plaintiff in response to the call of nature then and there proceeded to the restroom and relieved his suffering, notwithstanding the refusal of said Teacher to give him permission to do so.

5. The refusal to give such permission constituted a wanton aggravated invasion of the legal and constitutional rights of the Plaintiff, including but not limited to his right of privacy.

6. Defendant Lalar Tomberlin thereupon imposed disciplinary action of ten days detention against the Plaintiff due to his use of the restroom, and she subsequently refused to set aside this disciplinary action upon

Plaintiff's request to do so.

7. The disciplinary action appears as part of the Plaintiff's permanent school record and will thus be available for review for employment, military, education, and other purposes in the future.

3. The said conduct of Defendants while acting under color of law constituted deliberate indifference to the constitutionally protected rights of the Plaintiff with whom the state had contact and maintained a special or custodial relationship which existed between school and student, and it thus violated the Plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States of America and was further violative of the express provisions under Title 42 of the United States Code, Section 1983.

4. On or before said date Defendant Crenshaw County Board of Education had contact with the Plaintiff by way of a special or custodial relationship under color of law and

> have delegated final policymaking authority with regard to administration of discipline in such matters to one or more of the other Defendants, or, in the alternative, said Board had with deliberate indifference to the Plaintiff's constitutionally protected rights failed to implement policies or practices necessary and appropriate to handle such matters, and such conduct of the Defendant Board constituted a violation of the Plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States of America and was further violative of the express provisions under Title 42 of the United States Code, Section 1983.

Defendants filed an answer raising, among other things, the defense of sovereign immunity, discretionary function immunity, or qualified immunity. (CR 31-33) They later filed a motion for summary judgment, and this motion was granted in favor of the defendants. (CR 35-53, 60-64, 91-98, 102-103, 113-115) On appeal the Alabama Court of Civil Appeals affirmed this summary judgment on December 1, 1995, and

held as follows:

> The student argues that the teacher was not engaged in the exercise of a discretionary function because, he claims, a teacher has no discretion to refuse a student's request to go to the restroom. He maintains that "[w]hen the child needs to use the bathroom, there is no conceivable justification in denying him that need."
>
> * * *
>
> ...The teacher was entitled to immunity when she exercised her discretionary authority to refuse the student's request to leave the classroom. Likewise, when the principal determined what discipline should be imposed on the student for leaving the classroom without permission, and the superintendent upheld that disciplinary sanction, those administrators were also exercising discretionary functions, for which they have immunity. As to the state law claims, the summary judgments were proper

under the doctrine of discretionary immunity.

"To state a claim under § 1983, the plaintiff must allege facts constituting a deprivation of a constitutional right, under color of state law." Bonwell v. Bobo, 659 So. 2d at 102. Furthermore, in order to recover against a teacher or a school administrator under § 1983, a student must establish not only that he or she was deprived of a constitutional right, but also that the person who deprived him or her of that right did so in bad faith or with deliberate indifference to his or her rights. Id. Relying on Bonwell, the student claims that he was denied "a liberty interest in his bodily integrity," as well as a constitutional right to "privacy and freedom from humiliation and embarrassment."

In Bonwell, the Alabama Supreme Court held that students who had been sexually molested by a teacher had a § 1983 claim for violation of their substantive due process rights to bodily integrity. The facts of this case are a

> far cry from those in Bonwell. The Due Process Clause of the Fourteenth Amendment simply does not guarantee a student the right to be excused from a classroom upon demand, even if the asserted reason is to use the toilet. In this case, the student neither showed the deprivation of a constitutional right nor established bad faith or deliberate indifference on the part of the teacher and the administrators. The trial court properly entered the summary judgment as to the student's § 1983 claim.

Petitioner filed an application for rehearing on December 15, 1995, and the application raised the issue as follows:

> 5. The plaintiff has sufficiently stated a claim under Section 1983 by alleging facts constituting a deprivation of a constitutional right, that is, denial of a liberty interest in bodily integrity and violation of privacy and freedom from humiliation and embarrassment, under color of

state law with deliberate indifference to his rights.

Rehearing was denied without written opinion on January 12, 1996.

Petitioner then filed his petition for writ of certiorari in the Alabama Supreme Court and alleged as a ground for the issuance of the writ that the Court of Civil Appeals erred in holding "that a school teacher has discretionary immunity to refuse to allow a student to use a public school bathroom under urgent necessity due to diarrhea, and that Your Petitioner is not entitled to relief under 42 U.S.C. § 1983."

Certiorari by the Alabama Supreme Court was denied without opinion on May 31, 1996.

## ARGUMENT

Boyett has been deprived of a liberty interest within the purview of the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment protects him in his individual liberty against the type of government action demonstrated in this case. This "claim is grounded upon the premise that school children have a liberty interest in their

bodily integrity." Courtney Bonwell, et al. v. Thomas Bobo, et al., 659 So. 2d 98 (AL Supreme Court, 1995). Jerry Boyett had never missed a day in school that year due to illness. He had never asked the teacher to go to the bathroom before that incident. He was polite and respectful when he asked. However, on September 13, 1993, he woke up with diarrhea, but he went on to school, and two other teachers had excused him three times to use the bathroom earlier in the school day. (CR 91-98) His bodily integrity became an urgent and paramount concern. His bodily integrity not only involved his personal feelings and comfort, but it also related to his health, and not less importantly, to his privacy and freedom from humiliation and embarrassment. As it was, his underwear was soiled. If he had indeed yielded fully to the teacher's command, a huge embarrassment would have resulted. Instead, he yielded to the call of nature, as he should have done, and as a result he was unlawfully and unreasonably punished by the school authorities. These authorities have been uncompromising. They have refused to set aside the discipline, or to admit a mistake, or to apologize.

The Eleventh Circuit said in Arnold v. Board of Education of Escambia County, 880 F. 2d 305 ( 11th Cir. 1989):

"Students in our education system do not leave their constitutionally protected freedoms at the schoolhouse door. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). Indeed, the Supreme Court has recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, 364 U.S. 479, 387, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960). Boards of education educate the young to be productive citizens. To ensure that important principles of our government are not discounted by our youth as mere platitudes, we must give scrupulous protection to their rights at an early stage. Tinker, 393 U.S. at 507, 89 S.Ct. at 736. From this, it is clear that the school officials and the board had a duty to respect the constitutional rights of Jane Doe.

Our system of ordered liberty regards individual autonomy with high esteem. Although many guarantees of individual

autonomy are specifically enumerated in the Bill of Rights, the Supreme Court has also found that these specific guarantees have penumbras emanating from them which give them life and substance. Griswold v. Connecticut, 381 U.S. 479, 484, 85 S.Ct. 11678, 1681, 14 L.Ed. 2d 510 (1965). These penumbral rights create zones of privacy within which we find the constitutional guarantees safeguarding an individual's freedom of choice in matters relating to marriage and family. Id; Roe v. Wade, 410 U.S. 113, 169, 93 S.Ct. 705, 735, 35 L.Ed.2d 147 (1973) (Stewart, J. concurring)."

The complaint here sufficiently stated a § 1983 claim and the facts support the claim, because it is shown:

1. Jerry Boyett was deprived of a constitutional right, that is, denial of a liberty interest in bodily integrity and violation of privacy and freedom from humiliation and embarrassment. A student undoubtedly has a right to use the restroom when needed, and this

right must surely be a liberty interest in his bodily integrity. Denial of this right plainly constitutes a violation of his privacy and an unlawful restriction of his freedom from humiliation and embarrassment.

2. The teacher and school personnel acted as state school employees and so their denial here was done under color of state law.

3. The acts of the teacher and school personnel were deliberate.

4. The acts demonstrated clear indifference to the physical needs, health, comfort, privacy, and emotional feelings of the child.

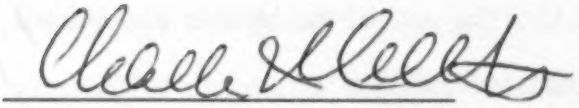
The particular facts in this case are unique, but the constitutional and statutory law applicable to the situation is well known.

The state courts of Alabama have decided an important federal question in a way that conflicts with relevant decisions of this Court. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed 2d 731 (1969); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5

L.Ed. 2d 231 (1960).

This is a case which merits review in order to make it clear that public school students are properly protected against abuses of institutional authority. The writ of certiorari should be granted.

Respectfully submitted,



Charles J. Kettler, Jr.
Kettler & Kettler
P.O. Box 47
Luverne, AL 36049
(334) 335-3262
Counsel for Petitioner

FILED

96 707 AUG 29 1996

OFFICE OF THE CLERK

DOCKET NUMBER

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1995

JERRY BOYETT, A MINOR CHILD,
SUING BY HIS FATHER AND NEXT
FRIEND, WAYNE BOYETT,

Petitioner,

v.

LALAR TOMBERLIN, JIM HEAD,
SAMMY CARR, and CRENSHAW COUNTY
BOARD OF EDUCATION,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of the State of Alabama

# APPENDIX TO
# PETITION FOR WRIT OF CERTIORARI

CHARLES J. KETTLER, JR.
Counsel of Record for Petitioner
P.O. Box 47
Luverne, Alabama 36049
(334) 335-3262

14 pp

TABLE OF CONTENTS

A: April 17, 1995, ORDER of Judge H. Edward McFerrin, Circuit Court, Crenshaw County, Alabama ..... 1

B: December 1, 1995, DECISION of Alabama Court of Civil Appeals ..... 5

C: January 12, 1996, Order overruling Application for Rehearing ..... 12

D: May 31, 1996, Order denying Petition for Writ of Certiorari of Alabama Supreme Court ..... 13

IN THE CIRCUIT COURT OF
CRENSHAW COUNTY, ALABAMA

| | | |
|---|---|---|
| JERRY BOYETT, a minor child suing by his father and next friend, WAYNE BOYETT, | ) | |
| Plaintiffs, | ) | CIVIL ACTION NUMBER |
| vs. | ) | CV-93-67 |
| LALAR TOMBERLIN, JIM HEAD, SAMMY CARR, individually and in their official capacities as Teacher, Principal, and Superintendent, respectively, and CRENSHAW COUNTY BOARD OF EDUCATION, | ) | |
| Defendants. | ) | |

## ORDER

This matter came before the Court on the Motion for Summary Judgment of the various defendants. Based on the matters submitted to the Court at the hearing on the motion, the Court is of the opinion that the Motion for Summary Judg-

ment is due to be and is hereby granted.

The Court grants summary judgment as to all counts of the plaintiff's Complaint seeking monetary or other damages.[1] The plaintiff has also demanded injunctive relief, or in the alternative, mandamus, to set aside the disciplinary action imposed against him and to expunge any record of the same from his permanent school record. The Court understands, and apparently the parties agree, that the plaintiff's school record contains no such notation of disciplinary action and further that there is no discipline record from this incident kept by the board of education. The demand for injunctive relief, or in the alternative, mandamus, is moot.

Having considered all materials submitted by the parties, having heard the oral arguments of counsel, and having considered the case law in Alabama noted previously, this Court now finds that there are no genuine issues of material fact and the defendants' Motion for Summary Judgment is due to be granted as a matter of law.

It is therefore ORDERED, ADJUDGED, and DECREED that the defendants are entitled to summary judgment in this matter. There being no just cause for delay, the Court Clerk is expressly directed to enter summary judgment in favor of the defendants.

DONE this the 17th day of April, 1995.

/s/H. Edward McFerrin

H. Edward McFerrin

Circuit Judge

---

[1] The Court is aware of 25 cases in favor of educators and/or boards of education which have been affirmed by the Alabama Supreme Court on the

issue of personal injury claimed by a student since 1986. All 25 cases were affirmations of the lower Court's entry of summary judgment, judgment on the pleadings, or a similar motion. One, Nance v. Matthews, was an affirmation order on a 12(b)(6) motion.

Hill v. Allen, 495 So. 2d 32 (Ala. 1986);
Brown v. Covington County Board of Education, 524 So. 2d 623 (Ala. 1988);
Wynn v. Board of Education of Vestavia Hills, 508 So. 2d 1170 (Ala. 1987);
Best v. Houtz, 541 So. 2d 8 (Ala. 1989);
Vardaman v. Florence City Board of Education, 544 So. 2d 962 (Ala. 1989);
Clements v. Moncrief, 549 So. 2d 479 (Ala. 1989);
Stevens v. Chesteen, 561 So. 2d 1100 (Ala. 1990);
Beasley v. Morton, 564 So. 2d 45 (Ala. 1990);
Riggs v. Bell, 564 So. 2d 882 (Ala. 1990);
Green v. Bester, 568 So. 2d 792 (Ala. 1990);
B.M. v. Crosby, 581 So. 2d 842 (Ala. 1991);
W.L.O. v. Smith, 585 So. 2d 22 (Ala. 1991);
Cason v. Oliver, 604 So. 2d 760 (Ala. 1992);
Coyle v. Harper, 622 So. 2d 302 (Ala. 1993);
Kroger v. Davis, 622 So. 2d 303 (Ala. 1993);
Nance v. Matthews, 622 So. 2d 297 (Ala. 1993);
Deal v. Hill, 619 So. 2d 1347 (Ala. 1993);
Lennon v. Peterson, 624 So. 2d 171 (Ala. 1993);
Hayes v. Walters, 628 So. 2d 558 (Ala. 1993);
Brown v. Jefferson County Board of Education, Released April 8, 1994;
Faulkner v. Patterson, Released October 28, 1994;
D.A.C. v. Thrasher, Released January 13, 1995;
Byrd v. Sullivan, Released February 24, 1995;

Danielowicz v. City of Florence Board of Education, Released March 10, 1995;

LSB v. Howard, Released March 17, 1995.

DEC 01 1995

ALABAMA
COURT OF CIVIL APPEALS

OCTOBER TERM, 1995-96

---

2940975

---

Jerry Boyett, a minor child,
suing by his father and next friend,
Wayne Boyett
v.
Lalar Tomberlin, et al.

Appeal from Crenshaw Circuit Court

(CV-93-67)

CRAWLEY, Judge

Jerry Boyett (the student), a senior at Luverne High School, sued Lalar Tomberlin (the teacher), Jim Head (the principal), Sammy Carr (the superintendent), and the county board of education (the board), after he was disciplined for leaving class, without permission, to go to the restroom.

The student sought compensatory and punitive damages for state law tort claims involving "pain and suffering, embarrassment, humiliation, and invasion of privacy," as well as injunctive relief, or, in the alternative, a writ of mandamus to set aside the disciplinary action and to expunge any record of it from his permanent school record. He also alleged a vio-

lation of his rights under the Fourteenth Amendment to the United States Constitution and requested relief pursuant to 42 U.S.C. § 1983. The trial court entered summary judgments in favor of all defendants, and the student appealed. The Alabama Supreme Court transferred the cause to this court pursuant to Ala. Code 1975, § 12-2-7(6).

The student alleged that on September 13, 1993, while he was enrolled in the teacher's class at Luverne High School, he was suffering from diarrhea; that at the beginning of class, he asked the teacher for permission to go to the restroom; that the teacher refused to give him permission; that five minutes later he renewed his request; and that upon receiving a second denial of his request, he left the classroom, without permission, and went to the restroom. The principal imposed a disciplinary sanction of 10 days' detention, which meant that the student was required to read or study each day for 10 days while other students had a 15-minute recess.

The teacher filed the following affidavit:

> "On September 13, 1993, in my 7th period class [the student] stood up and announced in a loud voice, almost immediately after the bell rang to begin class, that (quoting to the best of my recollection): 'I have got to go to the bathroom and this tea has got to come out.' He said nothing about diarrhea. The first time I heard anything about diarrhea was when I read the complaint against me, which was filed on November 16, 1993.
>
> "When [the student] did this, the facts I had before me were as follows:

"1. [The student] had been in my 6th period class immediately prior to this, where he exhibited no signs of discomfort.

"2. During my 6th period class, [the student] . . . did not request to go to the bathroom. He could have gone to the bathroom without any affect on his grades, because he was not getting a grade for this 6th period class. Instead of acting sick, he acted, in my opinion, in a disruptive manner and in an attempt to get attention. Towards the end of class, he popped a rubberband on some kind of notebook, making a sound . . . like a firecracker. All of the students stopped and looked at him. He said 'Why are y'all looking at me?'

"3. [The student] walked right by the bathroom when changing from my 6th period class to my 7th period class.

"4. [The student] arrived in my 7th period class with approximately 3 minutes to spare. He spent this time chatting with another student, whom I understand to be his girlfriend.

"5. [The student] was disruptive and disrespectful at the time he asked to leave the classroom. He was a disruptive student in my classroom at Luverne High School during his senior year.

"6. [The student] was interrupting my classroom when he stood up in class and made his an-

nouncement. Students in my classroom know that they can quietly approach me with a request to go to the bathroom and then leave the classroom. [The student's] loud interruption was not in keeping with this policy.

"I made a decision based on the above facts not to honor [the student's] request to go to the bathroom. Given the theatrical nature of his request, I felt that allowing such request would affect my ability to educate my students and control my classroom."

In Byrd v. Sullivan, 657 So. 2d 830 (Ala. 1995), a recent case involving a student's claims against a school principal and a county board of education alleging negligence and invasion of privacy, our Supreme Court reiterated the following long-standing principles:

"Article I, § 14, Ala. Const. (1901), provides that the State of Alabama shall not be made a defendant 'in any court of law or equity'; this is the constitutional basis for the doctrine of sovereign immunity. County boards of education, as local agencies of the State, partake of this immunity. Hutt v. Etowah County Bd. of Educ., 454 So. 2d 973, 974 (Ala. 1984). An individual who, while acting as a State agent, engages in the exercise of a discretionary function may also be entitled to qualified immunity. Nance v. Matthews, 622 So. 2d 297 (Ala. 1993); see also Faulkner v. Patterson, 650 So. 2d 873 (Ala. 1994).

'Discretionary acts' have been defined as

> '[t]hose acts [as to which] there is no hard and fast rule as to course of conduct that one must or must not take . . . [;] [those requiring] exercise in judgment and choice and [involving] what is just and proper under the circumstances.'

Black's Law Dictionary 467 (6th ed. 1990); see also Smith v. Arnold, 564 So. 2d 873, 876 (Ala. 1990); Nance v. Matthews, supra."

Byrd v. Sullivan, 657 So. 2d at 832-33 (brackets added by the court in Byrd). See also Bonwell v. Bobo, 659 So. 2d 98, 101 (Ala. 1995).

The student argues that the teacher was not engaged in the exercise of a discretionary function because, he claims, a teacher has no discretion to refuse a student's request to go to the restroom. He maintains that "[w]hen the child needs to use the bathroom, there is no conceivable justification in denying him that need." Of course, that argument begs the question, which, for the classroom teacher, is: does the student genuinely need to use the restroom, or is he seeking to get out of class for another reason? A teacher's resolution of that question necessarily involves an exercise in judgment and choice. It is the epitome of a discretionary function. The student's medical expert recognized as much on cross-examination:

> "Q. My question is: A teacher has to make a discretionary call in a situation like what happened at Luverne High School on September 13, 1993, that

is, to decide whether to interrupt the class, allow a student to leave or not allow a student to leave. Is that a fair statement?

"A. That's a fair statement."

In Byrd v. Sullivan, our Supreme Court observed:

> "[T]hese are the types of decisions made by teachers, principals, and other school personnel every day, using their best judgment and evaluation of the circumstances."

657 So. 2d at 833. The teacher was entitled to immunity when she exercised her discretionary authority to refuse the student's request to leave the classroom. Likewise, when the principal determined what discipline should be imposed on the student for leaving the classroom without permission, and the superintendent upheld that disciplinary sanction, those administrators were also exercising discretionary functions, for which they have immunity. As to the state law claims, the summary judgments were proper under the doctrine of discretionary immunity.

"To state a claim under § 1983, the plaintiff must allege facts constituting a deprivation of a constitutional right, under color of state law." Bonwell v. Bobo, 659 So. 2d at 102. Furthermore, in order to recover against a teacher or a school administrator under § 1983, a student must establish not only that he or she was deprived of a constitutional right, but also that the person who deprived him or her of that right did so in bad faith or with deliberate indifference to his or her rights. Id. Relying on Bonwell, the student claims that he was denied

"a liberty interest in his bodily integrity," as well as a constitutional right to "privacy and freedom from humiliation and embarrassment."

In Bonwell, the Alabama Supreme Court held that students who had been sexually molested by a teacher had a § 1983 claim for violation of their substantive due process rights to bodily integrity. The facts of this case are a far cry from those in Bonwell. The Due Process Clause of the Fourteenth Amendment simply does not guarantee a student the right to be excused from a classroom upon demand, even if the asserted reason is to use the toilet. In this case, the student neither showed the deprivation of a constitutional right nor established bad faith or deliberate indifference on the part of the teacher and the administrators. The trial court properly entered the summary judgment as to the student's § 1983 claim.

The student's claim for injunctive relief or for a writ of mandamus to expunge any record of this disciplinary proceeding from school records was also correctly denied. The principal's affidavit states that the disciplinary action against the student is not now and never was mentioned in the student's permanent record. The evidence in this case indicates that the disciplinary form was destroyed at the end of the student's senior year. The student does not dispute that evidence. Accordingly, there was no basis for injunctive relief.

The judgment of the trial court is affirmed.

AFFIRMED.

Robertson, P.J., and Thigpen, Yates, and Monroe, JJ., concur.

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY

Circuit Court No. CV 93-67
January 12, 1996
RE: 2940975

| | | |
|---|---|---|
| JERRY BOYETT, a minor child, suing by his father and next friend, WAYNE BOYETT, Appellant | vs. | LALAR TOMBERLIN, et al., Appellee |

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

Application for rehearing overruled. No opinion written on rehearing.

/s/ John H. Wilkerson, Jr.
Clerk, Court of Civil
Appeals of Alabama

MAILING ADDRESS:
300 Dexter Avenue
Montgomery, Alabama 36104-3741

IN THE SUPREME COURT OF ALABAMA

May 31, 1996

1950668

Ex parte Jerry Boyett, a minor child suing by his father and next friend, Wayne Boyett. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Jerry Boyett, a minor child suing by his father and next friend, Wayne Boyett v. Lalar Tomberlin, et al.) (2940975) (Crenshaw: CV-93-67)

CERTIFICATE OF JUDGMENT
Writ Denied

---

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COOK, J. - Hooper, CJ., Maddox, Shores and Kennedy, JJ., concur.

Supreme Court, U.S.
FILED
DEC 6 1996
CLERK

No. 96-707

In The

# Supreme Court Of The United States

October Term, 1996

JERRY BOYETT, a minor, suing by his father and next friend, Wayne Boyett,
*Petitioner*,

v.

LALAR TOMBERLIN, JIM HEAD, SAMMY CARR, AND THE CRENSHAW COUNTY BOARD OF EDUCATION,
*Respondents*.

**On Petition for Writ of Certiorari to the Supreme Court of Alabama**

## RESPONDENTS' BRIEF IN OPPOSITION

Mark S. Boardman
BOARDMAN & TYRA, P.C.
Post Office Box 59465
Birmingham, AL 35259-9465
(205) 980-6000

*Counsel for Respondents*

10 pp

## QUESTION PRESENTED

1. Whether the Appellate Courts of Alabama were proper in affirming Summary Judgment in favor of the Respondents as to the Petitioner's claim under the Due Process Clause of the Fourteenth Amendment.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iv

RESPONDENTS' BRIEF IN OPPOSITION . . . . . 1

OPINIONS BELOW . . . . . 1

JURISDICTIONAL STATEMENT . . . . . 1

STATEMENT OF THE CASE . . . . . 1

SUMMARY OF THE ARGUMENT . . . . . 2

ARGUMENT . . . . . 3

I. THE ALABAMA COURTS CORRECTLY HELD THAT PETITIONER FAILED TO STATE A VIABLE CLAIM FOR DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, PURSUANT TO 42 U.S.C. § 1983. . . . . 3

## TABLE OF CONTENTS - Continued

Page

II. THE RESPONDENTS ARE ENTITLED TO THE PROTECTION OF QUALIFIED IMMUNITY AS TO THE PETITIONER'S CLAIM UNDER § 1983 . . . . . 4

III. THE DECISIONS OF THE ALABAMA COURTS IN THIS CASE ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT . . . . . 8

CONCLUSION . . . . . 10

## TABLE OF AUTHORITIES

Page

### Federal Cases

Anderson v. Creighton, 483 U.S. 635 (1987) . . . . . 7

Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994), cert. denied, Lankford v. Doe, 115 S. Ct. 70 (1994) . . . . . 4

Harlow v. Fitzgerald, 457 U.S. 800 (1982) . . . . . 5

Hutton v. Strickland, 919 F.2d 1531 (11th Cir. 1990) . . . . 5

Malley v. Briggs, 475 U.S. 335 (1986) . . . . . 7

Mitchell v. Forsyth, 472 U.S. 511 (1985) . . . . . 7

Rodgers v. Horsley, 39 F.3d 308 (11th Cir. 1994) . . . . . 7

Shelton v. Tucker, 364 U.S. 479 (1960) . . . . . 2, 8

Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981) . . . . . 4

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) . . . . . 2, 8

### State Cases

Bonwell v. Bobo, 659 So. 2d 98 (Ala. 1995) . . . . . *passim*

**TABLE OF AUTHORITIES** - Continued

Page

Boyett by Boyett v. Tomberlin, 678 So. 2d 124 (Ala. Civ. App. 1995), cert. denied, No. 1950668 (Ala. May 31, 1996) ..... *passim*

Byrd v. Sullivan, 657 So. 2d 830 (Ala. 1995) ..... 6

Nance v. Matthews, 622 So. 2d 297 (Ala. 1993) ..... 6

**Constitutional Provisions**

U. S. Constitution, Fourteenth Amendment ..... 3, 8

**Statutes**

42 U.S.C. § 1983 ..... 3, 4

**Other Authorities**

Black's Law Dictionary (5th Edition 1979) ..... 6

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Lalar Tomberlin, Jim Head, Sammy Carr, and the Crenshaw County Board of Education, respectfully submit this Brief in Opposition to the Issuance of a Writ of Certiorari to the Supreme Court of Alabama.

## OPINIONS BELOW

The opinions of the Alabama Court of Civil Appeals and the Alabama Supreme Court are recorded at 678 So. 2d 124 (Ala. Civ. App. 1995), cert. denied, No. 1950668 (Ala. May 31, 1996).

## JURISDICTIONAL STATEMENT

Respondents agree with the Petitioner's allegations of this Court's jurisdiction.

## STATEMENT OF THE CASE

Respondents herein adopt the Petitioner's Statement of the Case.

## SUMMARY OF THE ARGUMENT

The Circuit Court of Crenshaw County, Alabama granted summary judgment in favor of the Defendants/Respondents in this matter. Plaintiff/Petitioner appealed and the Alabama Court of Civil Appeals affirmed. Petitioner requested rehearing and was denied by the Court of Civil Appeals; he then petitioned the Alabama Supreme Court to issue a writ of certiorari to review the matter. The petition was denied. Boyett by Boyett v. Tomberlin, 678 So. 2d 124 (Ala. Civ. App. 1995), cert. denied, No. 1950668 (Ala. May 31, 1996). Petitioner now asks this Court for certiorari review of the Alabama courts' decisions. The petition should be denied and no writ should issue.

First, Petitioner failed to present sufficient information to prove that what the Respondents did or did not do was a violation of Boyett's substantive due process rights. The Alabama courts agreed and found no constitutional deprivation. In addition, the Respondents were entitled to the protection of qualified immunity as to the due process claim. Petitioner failed to meet his burden by proving to the court that the right allegedly violated here was clearly established, so that a reasonable school official would have understood that his or her acts were unlawful.

Finally, Petitioner avers that the decisions of the Alabama Supreme Court and the Court of Civil Appeals in this case conflict with this Court's holdings in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) and Shelton v. Tucker, 364 U.S. 479 (1960). (Petition, p. 15). This proposition is in error. As the Court has stated, and as Respondents agree, students are not stripped of their constitutional rights once on school grounds. Id. The decisions

of the Alabama Courts in this case in no way assert anything which conflicts with this proposition.

## ARGUMENT

### I. THE ALABAMA COURTS CORRECTLY HELD THAT PETITIONER FAILED TO STATE A VIABLE CLAIM FOR DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, PURSUANT TO 42 U.S.C. § 1983.

In affirming summary judgment in favor of the Respondents, the Alabama Court of Civil Appeals found that the Petitioner failed to state a claim for deprivation of his Due Process rights under the Fourteenth Amendment, pursuant to the remedial provisions of 42 U.S.C. § 1983.

Petitioner relies on Bonwell v. Bobo, 659 So. 2d 98 (Ala. 1995), for the contention that because, under Bonwell, the Alabama Supreme Court found that school children have a liberty interest in their bodily integrity, Petitioner was thus deprived of such a liberty interest when he was not allowed to go to the restroom on demand. It is clear, however, that the facts of Bonwell and the present case are materially dissimilar.

Bonwell discussed the parameters of a substantive due process claim brought under § 1983 against school administrators by students who had been sexually abused by a teacher. The Alabama Supreme Court noted the Fifth Circuit Court of Appeals for the principle that "state-occasioned damage to a person's bodily integrity is protected by the

Fourteenth Amendment guarantee of due process." Bonwell at 9, citing Doe v. Taylor Independent School District, 15 F.3d 443, 450-52 (5th Cir. 1994), cert. denied, Lankford v. Doe, 115 S. Ct. 70 (1994), citing Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981). Such action is considered to be that which "transcend[s] the bounds of ordinary tort law and establish[es] a deprivation of constitutional rights." Id., at 10. As the Alabama Court of Civil Appeals correctly noted in the present case, "[t]he facts of this case are a far cry from those in Bonwell." Boyett, supra, at 127. Bonwell stands for the proposition that students who are sexually molested may have a right to bring a cause of action under § 1983; certainly not, as Petitioner would contend, that any time a teacher refuses to allow a student to leave class to go to the restroom, the teacher violates the student's constitutional rights.

The Petitioner's reliance on Bonwell is misplaced. Petitioner failed to present sufficient information which clearly established that what the Respondents did or did not do was a violation of Boyett's substantive due process rights. The Alabama courts agreed and found no constitutional deprivation. That decision was proper and does not merit review by this Court.

## II. THE RESPONDENTS ARE ENTITLED TO THE PROTECTION OF QUALIFIED IMMUNITY AS TO THE PETITIONER'S CLAIM UNDER § 1983.

The Respondents are further protected from this claim under § 1983 on the basis of qualified immunity, as the Petitioner has failed to state what clearly established law the challenged conduct violated.

The qualified immunity defense and its elements were set out in this Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982). The relevant language from Harlow states: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id., at 818.

The tests set forth in Harlow, supra, and its progeny, amount to an "objective-reasonableness" test, with two parts:

> 1. The defendant public official must prove that he was performing duties within the scope of his discretionary authority when the alleged violation occurred.
>
> 2. After the defendant proves he was acting within his discretionary authority, the burden shifts to the plaintiff to show a lack of good faith on defendants' part. This burden is met by proof demonstrating that the defendant public official's actions "violated clearly established constitutional law."

Hutton v. Strickland, 919 F.2d 1531, 1537 (11th Cir. 1990).

Both parts of the "objective-reasonableness" test fall in favor of the Respondents. Teaching, supervision of the classroom, decisions on the appropriateness of, and supervisory review of, disciplinary decisions (actions of which the Petitioner complains) fall squarely within the bounds of discretionary decision-making authority, vested in the positions held by the various Respondents.

The Alabama Supreme Court, in assessing the scope of discretionary acts (for which qualified immunity is extended), has adopted the language from Black's Law Dictionary 419 (5th Edition 1979):

> "Those acts [as to which] there is no hard and fast rule as to course of conduct that one must or must not take and if there is [a] clearly defined rule, such would eliminate discretion . . . . [It is] one which requires exercise in judgment and choice and involves what is just and proper under the circumstances."

Nance v. Matthews, 622 So. 2d 297, 300 (Ala. 1993).

The Alabama Court of Civil Appeals, in its opinion in the present case, citing the Nance decision, found that there was no question that the acts of the individual Defendants/Respondents Tomberlin, Head and Carr constituted discretionary functions, for which they possessed immunity. Boyett, supra, at 127. The Court quoted verbatim the affidavit of Respondent Lalar Tomberlin in assessing her actions in this case. Importantly, the affidavit notes that the Petitioner had previously had ample opportunity to use the restroom prior to class and his request to leave was loud and disruptive. Tomberlin concluded: " 'Given the theatrical nature of his equest, I felt that allowing such a request would affect my ability to educate my students and control my classroom.' " Id., at 126. The Court summarized its findings, citing the Alabama Supreme Court in Byrd v. Sullivan, 657 So. 2d 830, 833 (Ala. 1995) as follows: " '[T]hese are the types of decisions made by teachers, principals, and other school personnel every day, using their best judgment and evaluation of the circumstances.' " Boyett, supra, at 127.

Because the court found that the Respondents were engaged in discretionary functions, the Petitioner was then required to show a lack of good faith on the Respondents' part by demonstrating that "legal norms allegedly violated by the defendants were clearly established at the time of the challenged actions or, . . . the law clearly prescribe[d] the actions the defendant[s] . . . took." Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). This Court has said: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635 (1987). This Court has also stated that "[t]he qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

The Eleventh Circuit Court of Appeals, in Rodgers v. Horsley, 39 F.3d 308 (11th Cir. 1994), has said:

> When considering whether the law applicable to certain facts is clearly established, the facts of the cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.

Id., at 310.

The Petitioner states that the individual Respondents violated the constitutional rights of the Petitioner by claiming he was deprived of a liberty interest in his bodily integrity, relying on the Alabama Supreme Court's decision in Bonwell v. Bobo,

supra. The facts of Bonwell have been discussed previously, and the differences noted thereunder. In addition, it should be noted that Bonwell was decided on December 1, 1995. There is no way the Petitioner can rely on Bonwell as clearly establishing the law in this area so that the Respondents could understand that what occurred in the present case violated the constitutional rights of Petitioner. The incident in the present case occurred on September 13, 1993.

Boyett's reliance on Bonwell constitutes insufficient proof that the right allegedly violated here was clearly established, so that a reasonable school official would have understood that his or her acts were unlawful. As such, the Respondents were entitled to the protective shield of qualified immunity and the Alabama courts were proper in finding in favor of the Respondents on the Petitioner's claim under the Fourteenth Amendment.

## III. THE DECISIONS OF THE ALABAMA COURTS IN THIS CASE ARE NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

Boyett contends in his petition that the decisions of the Alabama Supreme Court and the Court of Civil Appeals in this case conflict with this Court's holdings in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) and Shelton v. Tucker, 364 U.S. 479 (1960). (Petition, p. 15). This proposition is in error. As the Court has stated, and as Respondents agree, students are not stripped of their constitutional rights once on school grounds. Id. The decisions of the Alabama Courts in this case in no way assert anything which conflicts with this proposition. The Alabama Court of Civil Appeals, in a unanimous decision, simply stated that, based on the facts presented in this case, "[t]he Due Process Clause of

the Fourteenth Amendment does not guarantee a student the right to be excused from a classroom upon demand, even if the asserted reason is to use the toilet." Boyett, supra at 127.

Thus, Petitioner's assertion that the Alabama courts are in conflict with this Court's findings in Tinker and Shelton if plainly erroneous and does not merit review by this Court.

## CONCLUSION

For the reasons stated herein, Respondents respectfully request that this Court deny the petition for a writ of certiorari and allow the decisions of the Alabama Supreme Court and Court of Civil Appeals to stand.

Respectfully submitted,

Mark S. Boardman
BOARDMAN & TYRA, P.C.
Post Office Box 59465
Birmingham, Alabama 35259-9465
(205) 980-6000

Counsel for Respondents